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Supreme Court, U.S.
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In The

Supreme Court of the United States

OLGA DE LEON; DAURYS BLADIMIL DE LEON; RAFAELA DE LEON; FRANKLIN ROA; JOSE GUERRERO MARTE; and CRISTIAN ENCARNACION,

Petitioners,

v.

SHIH WEI NAVIGATION CO. LTD.; DONG LIEN MARITIME SA PANAMA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When considering jurisdictional contacts on a nationwide basis under Federal Rule of Civil Procedure 4(k)(2) (as opposed to statewide contacts), should a different standard be used to judge a nonresident defendant's "continuous and systematic" contacts with the United States as a whole?

2. May a U.S. court exercise jurisdiction over the interests of a vessel that is bound for the United States, even though the basis of the tort for which suit is brought was committed outside U.S. waters?

3. Should a U.S. court exercise jurisdiction over nonresident defendants when agents of the nonresidents take action with the intention of avoiding legal repercussions in the United States?

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

Petitioners (Plaintiffs and Appellants in the Court of Appeals):

Olga De Leon, Daurys Bladimil De Leon, Rafaela De Leon, Franklin Roa, Jose Guerrero Marte, and Cristian Encarnacion.

Respondents (Defendants and Appellants in the Court of Appeals):

Shih Wei Navigation Co., Ltd. and Dong Lien Maritime S.A., Panama. Dong Lien is incorporated under the laws of Panama. Shih Wei is incorporated under the laws of Taiwan. Each corporation has its principal place of business in Taipei, Taiwan, Republic of China. Dong Lien Maritime S.A. is a 100% owned subsidiary of Shih Wei Navigation Co., Ltd.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of All Parties to Proceedings Below	ii
Table of Contents	iii
Table of Authorities	iv
Citation of Opinions Below	1
Statement of Jurisdiction	1
Federal Rule of Civil Procedure Involved	2
Statement of the Case	2
Reasons for Granting Writ	3
I. Introduction	4
II. Factual Background	4
III. Conclusion and Prayer for Relief	11

Appendix

Opinion of Fifth Circuit Court of Appeals, March 13, 2008 ..... App. 1

United States District Court for the Southern District of Texas's order denying Plaintiffs' motion for new trial and/or reconsideration, August 3, 2007 ..... App. 12

United States District Court for the Southern District of Texas's order granting Defendant Shih Wei Navigation Co., Ltd.'s and Defendant Dong Lien Maritime S.A. Panama's Motions to Dismiss for Lack of Personal Jurisdiction, July 10, 2007 ..... App. 18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 3

United Rope Distributors, Inc. v. Seatriumph Marine Corp., 930 F.2d 532 (7th Cir. 1991) 9, 10

World Tanker Carriers Corp. v. M/V Ya Mawlaya, 99 F.3d 717 (5th Cir. 1996) 4

FEDERAL STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1333 2

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 4(k)(2) ..... *passim*

OTHER AUTHORITIES

Sup. Ct. Rule 13 1

CITATION OF OPINIONS BELOW

Appendix 1: Opinion of the Fifth Circuit Court of Appeals, March 13, 2008.

Appendix 2: District Court's order denying Plaintiffs' motion for new trial and/or reconsideration, August 3, 2007.

Appendix 3: District Court's order granting Defendant Shih Wei Navigation Co., Ltd.'s and Defendant Dong Lien Maritime S.A. Panama's Motions to Dismiss for Lack of Personal Jurisdiction, July 10, 2007.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fifth Circuit issued its *per curiam,* unpublished opinion on March 13, 2008. App. 1, *also reprinted at* 2008 WL 687269 and 2008 AMC 1200 (5th Cir. 2008). No motion for rehearing was filed. The Supreme Court possesses jurisdiction under 28 U.S.C. § 1254 because this Petition for Writ of Certiorari was filed within ninety (90) days following the issuance of the final decision of a United States Court of Appeals. *See* Sup. Ct. Rule 13.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Federal Rule of Civil Procedure 4(k)(2): ("For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.").

STATEMENT OF THE CASE

Plaintiffs/Petitioners filed this personal injury and wrongful death lawsuit as a result of an incident that occurred on the Panamanian-flag cargo vessel, WELL PESCADORES, as it sailed from Santo Domingo, Dominican Republic, to Houston, Texas. The ship's crew forced five stowaways overboard into the sea, causing two to die. Plaintiffs brought suit pursuant to admiralty and maritime jurisdiction in the United States District Court for the Southern District of Texas, Galveston Division. 28 U.S.C. § 1333. *See* ROA at 18-22 (Plaintiffs' Original Complaint).

Defendants/Respondents are those entities at ownership interest with the vessel WELL PESCADORES, owner and charterer. As foreign-chartered corporations headquartered outside the United States, they both moved to dismiss the case for lack of personal jurisdiction. *See* ROA 406-427 (Defendant

Shih Wei's motion to dismiss) and 1460-1491 (Defendant Dong Lien's motion to dismiss). *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

On July 10, 2007, the United States District Court for the Southern District of Texas, Kent, J., dismissed the case for lack of personal jurisdiction over the Defendants. App. 18. The District Court analyzed the Defendants' contacts with the United States as a whole under Fed. R. Civ. P. 4(k)(2), but concluded these contacts (between 43-45 port calls by ships to U.S. ports) were insufficient to sustain general personal jurisdiction. App. 27-30. Thereafter, Plaintiffs moved for reconsideration, which was denied. App. 12.

Plaintiffs timely appealed to the Fifth Circuit Court of Appeals, which in a *per curiam* opinion dated March 13, 2007, affirmed the decision of the District Court. *See* App. 1, *also reprinted at* 2008 WL 687269 and 2008 AMC 1200 (5th Cir. 2008).

This proceeding follows.

REASONS FOR GRANTING WRIT

Petitioners Olga De Leon, Daurys Bladimil De Leon, Rafaela De Leon, Franklin Roa, Jose Guerrero Marte, and Cristian Encarnacion ("Petitioners"), seek this Court's review of the Opinion issued by the Court of Appeals for the Fifth Circuit (App. 1), respectfully showing:

I. Introduction

The question posed by this Petition is, in an admiralty case, when a non-resident defendant's personal contacts with *the United States as a whole* are being considered under Federal Rule of Civil Procedure 4(k)(2),[1] is the pattern and consistency of the defendant's jurisdictional contacts to be evaluated differently when using a nationwide analysis as opposed to a state-focused context? Logically, contacts that may be 'sporadic' or 'intermittent' when considered in the context of a single state context may be continuous and systematic when they are considered on a far broader, nationwide basis. Additionally, this Petition asks whether a U.S. court may exercise jurisdiction over the interests of a vessel that is bound for the United States, even though the basis of the tort for which suit is brought was committed outside U.S. waters.

II. Factual Background

In March 2003, five citizens of the Dominican Republic – William De Leon, Franklin De Leon, Franklin Roa, Jose Guerrero Marte and Cristian Encarnacion – stowed away aboard the Panamanian-flag vessel

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[1] The principle of using nationwide contacts in personal jurisdiction is provided in Federal Rule of Civil Procedure 4(k)(2), which is available in admiralty cases. *See World Tanker Carriers Corp. v. M/V Ya Mawlaya*, 99 F.3d 717, 723 (5th Cir. 1996).

WELL PESCADORES when it called on Santo Domingo, Dominican Republic, hoping to enter the United States. During the voyage to Houston, the five men made themselves known to the ship's crew, but were thrown overboard, causing two to die, and leaving three languishing on a hastily made raft.[2] The

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[2] The Maritime Union of Australia's newsletter of February 18, 2004 described the event as follows. It was attached as Ex. A to the Plaintiffs' Response to the Defendants' Motions to Dismiss, ROA 614-616:

> Five young men from the wrong side of the tracks in Santo Domingo, in the Dominican Republic, climbed onboard the Panama-flagged bulker [WELL PESCADORES] with no conception of the nightmare that was about to unfold or that just three of them would return home safely to their families, Lloyds List reports.
>
> The five men easily **evaded crew**, creeping up the ships gangway while **the Chinese crew were fishing off the side of the ship**.
>
> They hid until one man became sick midway through the voyage. Severely dehydrated, he and his friends decided to reveal themselves **to the crew** in the hope that he would receive medical aid. Instead they were forced off the ship where two of the five perished.
>
> . . .
>
> While IMO guidelines establish that **the crew should protect, feed and repatriate stowaways**, survivor Seaboard Valparaiso testified that they were forced to either make a raft or be thrown overboard.
>
> One crew member brought out family photos and begged for his life, but the FBI statement says that the captain said something to the effect of "to hell with your God", took the photographs and threw them in the air.

(Continued on following page)

ship arrived at Houston's Inbesa Terminal. The FBI and U.S. Coast Guard investigated the incident. The vessel later departed Houston after about a month.

Defendant Dong Lien Maritime S.A., Panama ("Dong Lien") – a corporation incorporated under the laws of Panama with principal place of business in Taipei, Taiwan – and Shih Wei Navigation Company Ltd. – a corporation incorporated under the laws of the Taiwan, Republic of China with principal place of business in Taipei, Taiwan – were the entities at interest with the M/V WELL PESCADORES. Dong Lien is a 100% subsidiary of Shih Wei. For purposes of appeal, the vessel owners' interests have been treated together.

The Court of Appeals noted – as the District Court concluded and Respondents have accepted below – that Respondents' contacts with the United States chiefly consisted of a series of between 43 and 45 port calls by ships to various ports across the U.S.

> The two cousins (neither of whom could swim) had little chance of survival. They were effectively thrown overboard when the rope ladder was cut before they had a chance to reach the other raft.
>
> One body was found almost a month later in such a putrefied state – and half eaten by sharks – that made identification of the [body] almost impossible. DNA testing of the deceased's family remains the only way to prove that the body is that of one of the stowaways.
>
> All evidence of the stowaways was also disposed of overboard, but some was recovered at sea.

ROA 614-616.

by vessels managed or owned by the Defendants. These port visits occurred during the three years before the stowaways were forced off the WELL PESCADORES (*i.e.*, in the years 2003 to 2005). Specifically, Shih Wei-owned vessels called on U.S. ports nine times in 2003, fourteen times in 2004, and twenty to twenty-two times in 2005. App. 9 at fn. 19. Like the District Court, the Court of Appeals observed that most of these vessels were under charter; and thus under the commercial direction and control of its charterer; nevertheless, the courts below proceeded to analyze the number of port calls made by the ships.

The Court of Appeals erred, as did the District Court, in failing to give these 43-45 calls on U.S. ports proper weight in a case brought under Rule 4(k)(2)'s provision for nationwide contacts in admiralty. In this case, the frequency of jurisdictional contacts should be considered in a nationwide context rather than a statewide context. The Court of Appeals said:

> At the time of the voyage at issue, Dong Lien owned three vessels and Shih Wei managed 22 vessels, which in combination made between 43 to 45 calls to various ports around the United States during the three years at issue. Thus, on average, each vessel called on a U.S. port about 0.68 times per year, or roughly twice every three years. **Neither is there any discernable pattern with respect to the timing and location of these calls: [Respondents'] vessels did not call**

> **on the same U.S. ports with any regularity or consistency.** In addition, almost every time one of the vessels did call on a U.S. port, it was under charter; and, pursuant to these charter parties, each vessel was under the commercial direction and control of its charterer. Accordingly, the charterers directed the vessels' movements, and [Respondents] had no control over the vessels' destinations or the ports on which they called.

App. at 9-10 (emphasis added).

As seen from the foregoing, the appeals court erred when it failed to logically expand conceptions of "continuous and systematic" as ordinarily used in a *state-based* jurisdictional analysis to encompass a broader conception of those same concepts that must be used in conducting jurisdictional analysis on a *nationwide* basis. The Court of Appeals gave improper weight to finding a "discernable pattern with respect to the timing and location of these calls." The United States is a far broader and more expansive forum than any of its component states, and it is self-evident that it is far less likely that vessels will be calling on the same U.S. port time after time, as might be true with a single State. Indeed, the fact that nationwide jurisdiction is available under Rule 4(k)(2) when the nonresident defendant is "not subject to the jurisdiction of the courts of general jurisdiction of any state" effectively *guarantees* that a nonresident's contacts will not all occur in a regular

pattern within a regular area when Federal Rule of Civil Procedure 4(k)(2) is invoked.

Given the applicability of Rule 4(k)(2) in this admiralty case, the courts below should have looked to the port visits *to the United States* – without regard to state boundaries, and conclude that the 43-45 port visits at issue were continuous and systematic with respect to the nation as a whole. The expanse of the United States means conceptions of "sporadic" will differ for Rule 4(k) analysis of nationwide contacts. A good example of such an approach using nationwide contacts is found in *United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534 (7th Cir. 1991);[3] ironically, the Seventh Circuit Court of Appeals concluded there was no personal jurisdiction because Rule 4(k)(2) was not in existence at the time the case was decided. As Judge Easterbrook lamented, "Perhaps it would be a good idea to have a uniform national rule for personal jurisdiction in admiralty and COGSA cases." *Id.* at 534. Nevertheless in analyzing the jurisdictional facts of this admiralty case, the Court of Appeals for the Seventh Circuit noted:

> [Defendant] Seatriumph has ample contacts with the United States. The *Katia* made four

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[3] Although *United Rope* was decided prior to the enactment of Rule 4(k)(2), the court noted that when a national court applies national law, the due process clause requires only that the defendant possess sufficient contacts with the United States. 930 F.2d at 534.

> voyages to seven different U.S. ports in 1986-87 and was bound for a fifth encounter, at an eighth port, when it sank. Seatriumph signed bills of lading submitting to the substantive law of the United States, as it submitted to U.S. law when borrowing in the United States the money to finance the *Katia's* purchase. **The United States is entitled to exercise sovereignty over vessels bound for its ports, even though they sink or are intercepted before reaching our territorial waters.**

United Rope Distributors, 930 F.2d at 534 (emphasis added). The Seventh Circuit not only correctly noted the fact that this country may properly exercise jurisdiction over vessels that are bound for U.S. ports, but the appeals court considered calls on ports without reference to their specific locations in states. Repeat calls on the same U.S. ports are not required under Rule 4(k)(2).

In short, when applying nationwide jurisdictional analysis under Rule 4(k)(2), the Court of Appeals erred when it affirmed the District Court's conclusion that Defendants'/Respondents' port calls to the U.S. were not uniform and not to the same ports over a period of time. Given the fact that Rule 4(k)(2) allows contacts to be considered on a nationwide basis, the conclusion was erroneous.

III. Conclusion and Prayer for Relief

Respondents should be subject to the general, *in personam* jurisdiction of the District Court because they purposefully availed themselves of the benefits of doing business in the United States by regularly sending their vessels to a series of United States ports on between 43 and 45 voyages, as found by the courts below. The consistency of these port contacts should be measured on a nationwide context, rather than on a statewide basis. Vessel owners and operators should not be allowed to reap the benefits of frequently calling on and trading in the United States, yet at the same time, escape the reach of American civil justice. Given the continuous and systematic nature of Respondents' calls to United States ports, and the logical difference that exists in the concept of consistency of contacts with a state versus the entire nation, a District Court can and should exercise jurisdiction over Respondents.

Petitioners additionally assert a due process argument that the tort committed in this case was undertaken by the crew of Respondents' vessel, with the deliberate intention of avoiding legal repercussions of landing stowaways in the United States. Respondents should reasonably anticipate being haled into a United States court to answer for a tort that occurred while their vessel was in route to the United States and that was committed because Respondents' crew sought to avoid the force of American immigration law. If the appellate court's decision is allowed to stand, the reasoning of the ship's crew

will have tragically succeeded. The fact the crew committed an intentional tort while proceeding to United States waters should not artificially preclude a U.S. court from exercising jurisdiction over the vessel's interests. Such a result would compound the tragedy and be poor public policy.

The decision of the Court of Appeals should be reversed, and the case remanded for further proceedings because the 43 to 45 port visits constitute continuous and systematic contacts sufficient for the imposition of general jurisdiction. Petitioners pray for all relief to which they may be justly entitled.

Respectfully submitted,

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2008 WL 687269

United States Court of Appeals, Fifth Circuit.
Olga DE LEON; Daurys Bladimil de Leon; Rafaela de Leon; Franklin Roa; Jose Guerrero Marte; Cristian Encarnacion, Plaintiffs-Appellants
v.
SHIH WEI NAVIGATION COMPANY LTD; Dong Lien Maritime Sa Panama, Defendants-Appellees.
No. 07-40829.
Summary Calendar.

March 13, 2008.

Francis Isadore Spagnoletti, Spagnoletti & Company, Houston, TX, for Plaintiffs-Appellants.

James Patrick Cooney, Royston, Rayzor, Vickery & Williams, Houston, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas, USDC No. 3:05-CV-579.

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Five citizens of the Dominican Republic – William De Leon, Franklin De Leon, Franklin Roa,

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Jose Guerrero Marte, and Cristian Encarnacion (the "Stowaways") – surreptitiously boarded the M/V WELL PESCADORES in an ill-fated attempt to enter the United States illegally. Plaintiffs-Appellants Olga De Leon, Daurys Bladimil De Leon, Rafaela De Leon, Franklin Roa, Jose Guerrero Marte, and Cristian Encarnacion ("Plaintiffs-Appellants") are either surviving stowaways or heirs of the decedent stowaways. They initiated this admiralty and maritime tort action seeking damages for personal injuries allegedly suffered by the Stowaways. Shih Wei Navigation Company, Limited ("Shih Wei") and Dong Lien Maritime S.A., Panama ("Dong Lien") (collectively "Defendants-Appellees") are the only remaining defendants in this action. They are alleged to represent the owner's interest of the M/V WELL PESCADORES. Plaintiffs-Appellants appeal the district court's dismissal of their action for lack of personal jurisdiction over Defendants-Appellees. Convinced that the district court correctly determined that Defendants-Appellees lack the requisite minimum contacts with the United States to confer general personal jurisdiction on the courts of this country, we affirm.

In March 2003, the Stowaways covertly boarded the WELL PESCADORES – a Panama-flagged cargo ship whose master was from Taiwan and whose crew was from the People's Republic of China – while it was calling on Santo Domingo, Dominican Republic; their apparent intent being to stow away aboard the ship until it reached its destination, Houston, Texas.

While the vessel was in international waters *en route* to Houston, the Stowaways were discovered by the vessel's crew and then either left voluntarily on a raft or were forcibly thrown overboard by the crew, depending on whose version of the story is true. Two of the Stowaways, William De Leon and Franklin De Leon, died.[1]

I

Plaintiffs-Appellants filed this suit against the vessel's owners and charterers.[2] They allege that Defendants-Appellees represent the vessel owner's interest, and as such were responsible for the actions of the vessel's crew under the charter party.[3] Shih Wei was indisputably the manager of the vessel for the voyage that gave rise to this action, and Dong Lien, a wholly-owned subsidiary of Shih Wei, acted as Shih

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[1] Plaintiffs-Appellants allege that the two men were thrown overboard but never made it to the raft because they could not swim.

[2] As is common, the owners of the WELL PESCADORES had chartered the ship for the voyage to another entity, BHP Billiton Transport and Logistics Pty., Ltd. ("BHBP"), a corporation incorporated under the laws of Australia. BHBP had, in fact, sub-chartered the vessel to Pegasus Shipping, a corporation incorporated under the laws of Turkey.

[3] The charter party provided that the owners of the WELL PESCADORES remained responsible for the vessel's crew.

Wei's agent and executed the charter party as owner with the charterer, BHBP.[4]

Both Defendants-Appellees are foreign corporations: Dong Lien was incorporated under the laws of Panama, and Shih Wei was incorporated under the laws of Taiwan. Each corporation has its principal place of business in Taipei, Taiwan. Defendants-Appellees filed a Federal Rule of Civil Procedure 12(b)(2) motion to dismiss, asserting that the district court lacked personal jurisdiction over them. The district court granted the motion, concluding that it could not exercise either specific jurisdiction or general jurisdiction over Shih Wei or Dong Lien. Plaintiffs-Appellants timely filed a notice of appeal. On appeal, they insist that Defendants-Appellees had sufficient contacts with the United States to support the district court's exercise of general personal jurisdiction over them.

II

We review *de novo* the question whether personal jurisdiction may be exercised over a defendant.[5] When the basis for personal jurisdiction is challenged and

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[4] Dong Lien claims that the owner of the WELL PESCADORES was Man Shipping, a limited partnership existing under the laws of the Isle of Man. Dong Lien, though, is defined as the "Owner" in the charter party, so any responsibilities assigned to the "owner" under that agreement were assigned to Dong Lien.

[5] *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 335 (5th Cir.1999).

the district court grants the defendant's motion to dismiss without holding an evidentiary hearing, the plaintiff need only make a "*prima facie* showing of the facts on which jurisdiction is predicated" on appeal.[6]

"Personal jurisdiction over a nonresident defendant attaches only when a defendant is amenable to service of process under the forum state's long-arm statute and the exercise of jurisdiction comports with the due process clause of the [F]ourteenth [A]mendment."[7] Alternatively, when a claim arises under federal law, as is the case here, personal jurisdiction may be exercised only if doing so would be proper under the due process clause of the Fifth Amendment.[8]

"The due process inquiry likewise has two parts. For personal jurisdiction to exist the nonresident defendant purposefully must have established 'minimum contacts' with the forum state such that he invoked the benefits and protections of the forum's laws and thus reasonably could anticipate being haled into court there. In addition, circumstances must be such that the exercise of personal jurisdiction does not offend 'traditional notions of fair play and

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[6] *Nuovo Pignone, SpA v. STORMAN ASIA M/V,* 310 F.3d 374, 378 (5th Cir.2002).

[7] *Asarco, Inc. v. Glenara, Ltd.,* 912 F.2d 784, 786 (5th Cir.1990).

[8] *See* FED.R.CIV.P. 4(k)(2); *World Tankers Carriers Corp. v. M/V Ya Mawlaya,* 99 F.3d 717, 723 (5th Cir.1996).

substantial justice.'"[9] The "minimum contacts" inquiry may be further subdivided into contacts that give rise to either specific jurisdiction or general jurisdiction. "When a cause of action arises out of a defendant's purposeful contacts with the forum, minimum contacts are found to exist and the court may exercise its 'specific' jurisdiction. Even a single, substantial act directed toward the forum can support specific jurisdiction. Where a cause of action does not arise out of a foreign defendant's purposeful contacts with the forum, however, due process requires that the defendant have engaged in 'continuous and systematic contacts' in the forum to support the exercise of 'general' jurisdiction over that defendant . . . [C]ontacts of a more extensive quality and nature are required."[10]

Plaintiffs-Appellants do not contest the district court's conclusion that it could not exercise specific jurisdiction over Defendants-Appellees; instead, they assert that the 43 to 45 calls[11] made on U.S. ports by

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[9] *Asarco*, 912 F.2d at 786 (citations omitted).

[10] *Id.*

[11] Plaintiffs-Appellants allege that Defendants-Appellees called on U.S. ports 96 times in the three years preceding the incident at issue. The district court, however, recognizing that it could only consider the calls made prior to the filing of the action, *see id.* at 787 n. 1 (noting that "the relevant time for determining jurisdiction is the filing of the complaint"), determined that vessels owned, operated, or managed by Shih Wei made between 43 to 45 calls on U.S. ports during the relevant time frame.

vessels owned or managed by Defendants-Appellees during the three years preceding the incident in question support that court's exercise of general jurisdiction under Federal Rule of Civil Procedure 4(k)(2).[12] Specifically, Plaintiffs-Appellants insist that if the district court had properly applied our precedent in *Asarco, Inc. v. Glenara, Ltd.*[13] in the Rule 4(k)(2) context by considering Defendants-Appellees' contacts with the United States *as a whole,* it would have recognized that Defendants-Appellees had "continuous and systematic" contacts with the forum, based on their repeated calls on U.S. ports. Having reviewed the record on appeal, the parties' briefs, and the applicable case law, we are convinced that the district court properly considered and applied *Asarco* in light of Rule 4(k)(2). Moreover, we agree with the district court that the requisite "minimum contacts" to support the exercise of general personal jurisdiction are lacking.

In *Asarco,* ASARCO, Inc. ("ASARCO") sought to recover damages for cargo lost when the vessel carrying the cargo sank by filing suit in federal district court in Louisiana against the owner of the vessel,

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[12] *See* FED.R.CIV.P. 4(k)(2) ("For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.").

[13] 912 F.2d 784 (5th Cir.1990).

Glenara, Ltd., as well as the manager of the vessel, Anglo-Eastern Management Services Limited ("Anglo-Eastern").[14] ASARCO insisted that Anglo-Eastern had sufficient contacts with Louisiana to support the exercise of general personal jurisdiction based solely on 20 calls made by Anglo-Eastern-managed vessels to various ports in the State of Louisiana in the five years preceding the accident.[15] We concluded that such contacts were "better characterized as sporadic than continuous and systematic," and that they were "insufficient to cause Anglo-Eastern reasonably to anticipate the possibility of being haled into court in Louisiana."[16] Furthermore, we emphasized that Anglo-Eastern's vessels were under charter when they called on Louisiana ports, and that the respective charterers controlled the vessels' destinations and dictated the ports on which the vessels called. Accordingly, we concluded that Anglo-Eastern could not "be held to have availed itself of the benefits and protections of doing business in Louisiana by virtue of its sporadic operational management of vessels sent to Louisiana by others."[17]

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[14] *Id.* at 785.

[15] *Id.* at 787. We observed in *Asarco* that "Anglo-Eastern was not licensed to do business in Louisiana; did not solicit business there; did not maintain an office there; and did not own property or employ personnel in the state." *Id.*

[16] *Id.*

[17] *Id.*

Similar to Anglo-Eastern, Defendants-Appellees' sole contacts with the forum were calls made on forum ports in the years preceding the incident at issue.[18] Defendants-Appellees are not licensed or authorized to do business in the United States; they have never advertised or solicited any business in the United States; they do not maintain a place of business or office in the United States; they have no employees or agents located in the United States; they have never maintained a telephone number or mailing address in the United States; and they have never owned, leased, or possessed any interest in property in the United States.

At the time of the voyage at issue, Dong Lien owned three vessels and Shih Wei managed 22 vessels, which in combination made between 43 to 45 calls to various ports around the United States during the three years at issue.[19] Thus, on average, each vessel called on a U.S. port about 0.68 times per year, or roughly twice every three years. Neither is there any discernable pattern with respect to the timing and location of these calls: Defendants-Appellees' vessels did not call on the same U.S. ports with any

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[18] We recognize, and indeed the district court did as well, that the relevant forum for analyzing Defendants-Appellees' contacts is the United States, whereas, in *Asarco,* the relevant forum was the State of Louisiana.

[19] Shih Wei-owned vessels called on U.S. ports nine times in 2003, fourteen times in 2004, and twenty to twenty-two times in 2005 prior to the filing of this action.

regularity or consistency. In addition, almost every time one of the vessels did call on a U.S. port, it was under charter; and, pursuant to these charter parties, each vessel was under the commercial direction and control of its charterer. Accordingly, the charterers directed the vessels' movements, and Defendants-Appellees had no control over the vessels' destinations or the ports on which they called.[20]

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[20] *See, e.g., Griner Co. v. M/V Conti Blue,* 1996 U.S. Dist. LEXIS 21561 *4-5 (S.D.Tex.1996) (holding that "[u]nder Fifth Circuit law, it is clear that the owner of a vessel is not subject to personal jurisdiction merely because his vessel was used to transport goods into the forum state"); *Saudi v. S/T Marine Atlantic,* 159 F.Supp.2d 469, 482 n. 8 (S.D.Tex.2000) (noting that "where the non-resident defendant does not direct and control the destination of the vessel, there is no personal jurisdiction over that defendant because that defendant cannot purposely avail itself of the benefits and protections of the forum port"); *Sibrian v. Chapel Navigation,* 1997 U.S. Dist. LEXIS 19616 *4 (E.D.La.1997) (holding that "because the [vessel] owner did not choose the ports, the owner cannot be held to have availed itself of the benefits and protections of doing business in Louisiana by virtue of the contacts") (internal quotations omitted); *Mutualidad Seguros del Instituto Nacional de Industria v. M/V Luber,* 1998 U.S. Dist. LEXIS 23165 *5-7 (S.D.N.Y.1998) ("explaining that "[w]here the vessel's owner has ceded authority to the charterer, the choices of the latter cannot be imputed to the former"); *Nicolaisen v. Toei Shipping Co.,* 722 F.Supp. 1162, 1165 (D.N.J.1989) (noting that the vessel owner's lack of control over where the vessel would make port "militates against finding that [the vessel owner] was reasonably put on notice that it might be called upon to defend actions in [the forum]"). Compare these cases with *Walter v. Sealift, Inc.,* 35 F.Supp.2d 532, 534-35 (identifying that defendants remained in operational control of their vessels and generally knew the precise itinerary

(Continued on following page)

We reject Plaintiffs-Appellants' assertion that the crew's discovery of the Stowaways returned operational control of the WELL PESCADORES and its destination to Defendants-Appellees in accordance with Clause 40(b)(I) of the charter party. Plaintiffs-Appellants' contention is based on an incorrect interpretation of the term "off-hire." Accordingly, we conclude that the charterer or sub-charterer retained operational control of the WELL PESCADORES at all relevant times.

III

When we consider the isolated and sporadic nature of the calls made on U.S. ports by Defendants-Appellees' vessels, the lack of control Defendants-Appellees' possessed over these calls, and the absence of any other contacts with the United States in the framework of *Asarco,* we conclude that Defendants-Appellees lack the requisite "continuous and systematic" contacts with the forum to support the exercise of general personal jurisdiction. The district court's dismissal of this action for lack of personal jurisdiction is

AFFIRMED.

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of the voyages undertaken was an important factor in satisfying the requisite "minimum contacts").

2007 WL 2263847

United States District Court,
S.D. Texas, Galveston Division.
Olga DE LEON, et al., Plaintiffs,
v.
SHIH WEI NAVIGATION CO., LTD., et al.,
Defendants.
Civil Action No. G-05-579.

Aug. 3, 2007.

Francis I. Spagnoletti, Spagnoletti & Co., Houston, TX, for Plaintiffs.

James Patrick Cooney, Erik David Garza, Royston Rayzor, et al., Houston, TX, for Defendants.

MOTION DENYING PLAINTIFFS' MOTION FOR NEW TRIAL AND/OR RECONSIDERATION

SAMUEL B. KENT, United States District Judge.

This case involves five stowaways who were allegedly thrown overboard when they were discovered on a ship that was sailing from the Dominican Republic to Galveston, Texas. Three of the stowaways allegedly suffered severe personal injuries, and the other two stowaways died. Defendants Shih Wei Navigation Co., Ltd. ("Shih Wei") and Dong Lien Maritime S.A., Panama ("Dong Lien") each filed a Motion to Dismiss for Personal Jurisdiction, and the Court granted said Motions on July 10, 2007. Now before the Court is Plaintiffs' Motion for a New Trial and/or Reconsideration of the Order Granting Defendant Shih Wei's and Defendant Dong Lien's Motions

to Dismiss for Lack of Personal Jurisdiction. Plaintiffs offer three reasons why the Court should reconsider its ruling. After considering these reasons, the Court finds that Plaintiffs' Motion must be respectfully **DENIED**.[1]

I. Port Calls

Plaintiffs claim that the Court misapplied the Fifth Circuit's holding in *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784 (5th Cir.1990) when it determined that the port calls made by vessels that were owned or operated by Shih Wei or Dong Lien did not rise to the level of minimum contacts necessary for the exercise of general jurisdiction. Because neither Shih Wei nor Dong Lien controlled the destinations of their vessels, the Court found that they did not purposefully avail themselves of the benefits and protections of Texas law. Plaintiffs assert that the *Asarco* Court did not hold that the contacts of an owner or operator should be disregarded if they were made at the direction of a charterer. Rather, Plaintiffs contend that *in personam* jurisdiction could not be exercised because the *Asarco* defendant's contacts were "better characterized as sporadic than continuous and systematic." *Asarco*, 912 F.2d at 787.

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[1] The Court does not deem this Order worthy of publication. Accordingly, it has not requested and does not authorize publication.

The Court agrees that the sporadic nature of the defendant's calls to Louisiana was a factor is the *Asarco* Court's decision. However, the *Asarco* Court *also* noted that the defendant "lacked control over where the vessels would make port," and it ultimately concluded that the defendant could "not be held to have availed itself of the benefits and protections of doing business in Louisiana by virtue of its sporadic operational management of vessels *sent to Louisiana by others.*" *Id.* (emphasis added). While the *Asarco* decision was multi-faceted, the defendant's lack of control over the destination was a key element. In the instant case, like in *Asarco,* the charterer, not the owners or operators, chose the ship's destination. The Court appreciates Plaintiffs' attempt to distinguish *Asarco,* but it cannot agree that the contacts in the instant case are indicative of purposeful availment on Shih Wei's or Dong Lien's part. Accordingly, it is inappropriate to assert jurisdiction over these defendants based on the port calls alone.[2]

II. Time Charter Agreement

Plaintiffs next raise an argument that was not contained in their Response to the Motions to Dismiss. Plaintiffs point out that under the Time Charter Party's Stowaway provision, the chartered vessel

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[2] The only contacts alleged are the port calls made by vessels that were either owned or operated by Shih Wei or Dong Lien and the shore-side contacts that are necessarily associated with port calls.

was "off hire" after the stowaways gained access to the vessel. Thus, Plaintiffs claim that Shih Wei or Dong Lien did have control over the destination in this case. The Court finds this argument very clever and is impressed with counsel's zealous advocacy. However, Shih Wei and Dong Lien's counter-argument regarding the meaning of the term "off hire" is convincing. Under the Charter, when a vessel is "off hire," "the payment of hire and overtime, if any, shall cease for the time thereby lost." "Off hire" apparently applies to pay and overtime. The definition in no way indicates that the owner and/or operator is relieved of its obligation to deliver the charterer's cargo to the destination the charterer chose. Thus, the vessel's destination after it was "off hire" is not an indication that Defendants purposefully directed their activities toward Galveston.

III. Fair Play and Substantial Justice

The Court extensively discussed the fair play and substantial justice prong in the Order Granting Shih Wei's and Dong Lien's Motions to Dismiss for Lack of Personal Jurisdiction, and it determined that the weighty policy considerations in the instant case were best left to the Fifth Circuit's discretion. Nevertheless, the Court will briefly discuss Plaintiffs' new contention regarding fair play and substantial justice.

Plaintiffs argue that the crew threw the stowaways overboard because they were attempting to avoid or evade U.S. laws and that, if the Court's

Order dismissing the claims against the owners stands, they will have "tragically succeeded" in their evasion. The Court is certainly sympathetic with Plaintiffs' plight, as should be evident from the fair play and substantial justice analysis in the Court's previous ruling, but, while it applauds Plaintiffs' whole-hearted advocacy, it cannot agree with this argument. Plaintiffs' Motion for New Trial and/or Reconsideration discusses the penalties that were imposed on Defendants once they arrived in the United States. According to Plaintiffs, the vessel was detained for nearly a month, the U.S. marshals secured the vessel while it was detained, and the captain and crew were not permitted to leave the vessel. Thus, Plaintiffs own Motion belies their assertion that the crew "succeeded" in their mission to evade U.S. law. The law they were attempting to evade is the law associated with bringing stowaways into the United States, not U.S. tort law.

The Court agrees that this case is a tragedy, and, as it discussed in its previous ruling, it encourages Plaintiffs to appeal the Court's decision not to exercise jurisdiction.[3] But, the Court must follow the guidelines that the Fifth Circuit and the United States Supreme Court have thus far set regarding the

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[3] The Court candidly points out that, if the Fifth Circuit reverses its Order Granting Shih Wei's and Dong Lien's Motions to Dismiss, it will be delighted to proceed. The Court, however, is duty-bound to apply the law as it exists regardless of the poignancy of the facts that are placed before it.

exercise of personal jurisdiction over foreign defendants, and it cannot allow its sympathies with the tragedies Plaintiffs have faced to usurp its duty to follow the Fifth Circuit's and Supreme Court's interpretations of the Constitution.[4]

IV. Conclusion

For the reasons enunciated above, the Court **DENIES** Plaintiffs' Motion for New Trial and/or Reconsideration.

IT IS SO ORDERED.

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[4] As the Court noted in its previous Order, this case presents significant policy considerations regarding the sanctity of human life that are best left to the Fifth Circuit. The old legal adage that "great facts make bad law" is applicable to this case. Making decisions based on the heart rather than on legal precedent only serves to scramble the legal omelet. In our legal system, the circuit courts hold the frying pan, and the district courts take their eggs as they are served. Otherwise, there would be too many cooks in the kitchen.

2007 WL 2021738

United States District Court,
S.D. Texas, Galveston Division.
Olga DE LEON, et al., Plaintiffs,
v.
SHIH WEI NAVIGATION CO., LTD., et al.,
Defendants.
Civil Action No. G-05-CV-579.

July 10, 2007.

Francis I. Spagnoletti, Spagnoletti & Co, Houston, TX, for Plaintiffs.

James Patrick Cooney, Erik David Garza, Royston Rayzor Et. Al., Houston, TX, for Defendants.

ORDER GRANTING DEFENDANT SHIHWEI NAVIGATION CO, LTD.'S AND DEFENDANT DONG LIEN MARITIME S.A. PANAMA'S MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

SAMUEL B. KENT, United States District Judge.

Plaintiffs Olga De Leon, Daurys Bladimil De Leon, both individually and on behalf of the Estate of William De Leon, Rafaela De Leon, individually and on behalf of the Estate of Franklin De Leon, Franklin Roa, Jose Guerrero Marte, and Christian [sic] Encarnacion (collectively "Plaintiffs") bring this action in tort for personal injuries allegedly suffered by William De Leon, Franklin De Leon, Franklin Roa, Jose Guerrero Marte, and Christian [sic] Encarnacion (the "Stowaways") when they stowed away on the WELL

PESCADORES S.A. and were either left in international waters on a raft or thrown overboard. The events giving rise to this action resulted in the deaths of William De Leon and Franklin De Leon. Defendant Shih Wei Navigation Co., Ltd. ("Shih Wei") and Defendant Dong Lien Maritime S.A. Panama ("Dong Lien") each filed a Motion to Dismiss for Lack of Personal Jurisdiction. Plaintiffs timely filed a Response thereto, and Shih Wei filed a Reply. For the reasons enunciated below, Defendants' Motions are both **GRANTED.**[1]

I. Background

"Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!"[2]

Plaintiffs William de Leon, Franklin de Leon, Franklin Roa, Jose Guerrero Marte, and Christian Encarnacion lived in Santo Domingo, Dominican Republic. They were allegedly "from the wrong side of

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[1] The Court does not consider this Order worthy of publication. Thus, it has not requested and does not authorize publication.

[2] These words, written by poet Emma Lazarus, symbolize the hope that emanates from the Statue of Liberty to those who pass by her de-shackled feet and under her torch of enlightenment on their paths to the freedom and liberty that they presume they will find in the United Statues. Lazarus's poem, *The New Colossus,* is engraved on the great Lady's pedestal.

the tracks." Pls.' Resp. Ex. A. In March, 2003, the five men, ostensibly in search of "the golden door," decided to stowaway on a ship that was headed for Houston, Texas. The WELL PESCADORES was a Panama-flagged ship, and her crew was from China. The five men boarded the ship via the gangway while the crew was fishing off the side of the ship.

The WELL PESCADORES was time-chartered to BHP Billiton Transport and Logistics Pty. Ltd., Melbourne, but the crew was furnished by Dong Lien, which is a wholly owned subsidiary of Shih Wei. The crew was responsible for ensuring that no stowaways were aboard the WELL PESCARDORES when it set sail. Unfortunately, the Stowaways were not discovered before the vessel departed.

When the WELL PESCADORES was about halfway to Houston, one of the Stowaways became ill. The five men decided to call upon the human compassion of the crew, who were incidentally charged by the International Maritime Organization to "protect, feed, and repatriate stowaways," and made their presence known. Pls.' Ex. A. The crew, who Plaintiffs allege were to receive bonuses if there were no stowaways when they reached Houston, allegedly showed no compassion at all. Instead, they allegedly threw two of the Stowaways overboard and left the other three men on a raft in the middle of the sea. Plaintiffs claim that the two stowaways who were thrown overboard never made it to the raft because they could not swim. The three men on the raft were picked up by another vessel approximately four hours

later. The shark-eaten bodies of the two other men were found some time later. *See* Rainbow Nelson, *How the War Against Terror is Putting Some in Fear of their Lives,* LLOYD'S LIST INT'L, Feb. 18, 2004, *available at* 2004 WLNR 6990252; *see also* Pls.' Ex. A.

Plaintiffs claim that Shih Wei and Dong Lien represented the owner's interests and were, under the charter, solely responsible for the WELL PESCADORES's crew. As such, Plaintiffs have sued Shih Wei and Dong Lien in tort. Shih Wei and Dong Lien are both foreign corporations, and they claim that this Court may not assert *in personam* jurisdiction over them. The Court will discuss the legal and constitutional requirements for a U.S. court to exercise jurisdiction over foreign defendants, then it will explain why it must, regrettably, dismiss Plaintiffs' claims against Shih Wei and Dong Lien for lack of personal jurisdiction.

II. Legal Standard

Generally, the plaintiff bears the burden of establishing the Court's jurisdiction over a nonresident defendant. *See Wilson v. Belin,* 20 F.3d 644, 648 (5th Cir.1994). However, it is sufficient for the plaintiff to make a *prima facie* showing of jurisdiction, and any conflicts between affidavits are resolved in favor of the plaintiff. *See Asarco, Inc. v. Glenara, Ltd.,* 912 F.2d 784, 785 (5th Cir.1990); *Guyton v. Pronav Ship Mgmt., Inc.,* 139 F.Supp.2d 815, 818 (S.D.Tex.2001). A nonresident defendant is subject to personal

jurisdiction in this District if: (1) the defendant is amenable to service of process under Texas's long-arm statute; and (2) the exercise of personal jurisdiction over the defendant is consistent with due process. *See Stripling v. Jordan Prod. Co., L.L.C.,* 234 F.3d 863, 869 (5th Cir.2000); *Jones v. Petty-Ray Geophysical Geosource, Inc.,* 954 F.2d 1061, 1067 (5th Cir.1992). The Texas long-arm statute grants jurisdiction over a nonresident defendant "doing business" in Texas. *See* Tex. Civ. Prac. & Rem.Code Ann. § 17.042 (Vernon 1997). The phrase "doing business" has been interpreted to reach as far as the United States Constitution permits, and therefore the jurisdictional inquiry under the Texas long-arm statute collapses into a single due process inquiry. *See Ruston Gas Turbines, Inc. v. Donaldson Co.,* 9 F.3d 415, 418 (5th Cir.1993); *Williams v. Castro,* 21 F.Supp.2d 691, 692 (S.D.Tex.1998); *Schlobohm v. Schapiro,* 784 S.W.2d 355, 356-57 (Tex.1990). Whether the exercise of personal jurisdiction over a defendant is consistent with the Due Process Clause of the United States Constitution likewise requires a two-pronged inquiry. First, the Court must conclude that the defendant has "minimum contacts" with the forum state. *See Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Second, the Court must determine whether requiring the defendant to litigate in this forum offends "traditional notions of fair play and substantial justice." *Id*; *see also Wilson,* 20 F.3d at 647; *Ruston Gas Turbines,* 9 F.3d at 418.

1. Minimum Contacts

The "minimum contacts" prong can be satisfied by finding either specific or general jurisdiction over a defendant. *See Wilson,* 20 F.3d at 647. A defendant's limited contact with the forum state may support specific jurisdiction if such contact gives rise to the cause of action. *See Ruston Gas Turbines,* 9 F.3d at 419 ("A single act by the defendant directed at the forum state, therefore, can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted.").

A defendant's contacts unrelated to the cause of action may confer general jurisdiction, but these contacts must be continuous, systematic, and substantial. *See Wilson,* 20 F.3d at 647, 650-51. A defendant's contacts with the forum state may be deemed continuous, systematic, and substantial if the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985) (citing *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958)). Such contacts need not exhibit a physical presence within the state, but they should be "such that [the defendant] should reasonably anticipate being haled into court there." *Id.* at 474-76, 105 S.Ct. at 2183-84 (citing *World-Wide Volkswagen Corp. v. Woodson,* 44 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed. 490 (1980)). In admiralty

cases, if the defendant "is not subject to the jurisdiction of the courts of general jurisdiction of any state," the "forum" for minimum contacts purposes is the "nation as a whole." *World Tanker Carriers Corp. v. M/V YA MAWLAYA*, 99 F.3d 717, 723 (5th Cir.1996).

2. Fair Play and Substantial Justice

The second prong of the due process inquiry requires the Court to determine whether the exercise of jurisdiction would violate "'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co.*, 325 U.S. at 316, 66 S.Ct. at 158. However, "where a defendant who purposely has directed his activities at a forum's residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp.*, 471 U.S. at 477, 105 S.Ct. at 2184. The Court may consider factors such as "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'" *Id.* (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 292, 100 S.Ct. at 564). Occasionally, "these factors . . . serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.*

III. Analysis

A. Specific Jurisdiction

Plaintiffs claim that the Court may assert specific jurisdiction over Shih Wei and Dong Lien because this case arises out of the activities of the crew of the WELL PESCADORES. Shih Wei was indisputably the manager of the WELL PESCADORES during the voyage giving rise to this action, and Dong Lien is listed as the owner on the time-charter agreement.[3] Plaintiffs claim that this case arises out of the conduct of the crew and that Dong Lien and Shih Wei were responsible for the crew and its conduct.[4]

Shih Wei and Dong Lien argue that the Court cannot assert specific jurisdiction over them because, while the companies may have been involved in the voyage, they had no control over the destination of the vessel, and thus did not purposely direct any actions at this forum. The Court agrees with Shih Wei and Dong Lien. Though the Court is convinced that Shih Wei and Dong Lien provided the crew and

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[3] Dong Lien claims that the owner of the WELL PESCADORES was Man Shipping. However, Dong Lien is defined as the "Owner" in the time-charter agreement, so any responsibilities assigned to the "owner" under that agreement were assigned to Dong Lien.

[4] Dong Lien agreed to this responsibility when it signed the time-charter agreement, and Shih Wei was the operator of the vessel, and thus also responsible for the crew. Additionally, Plaintiffs claim that Shih Wei and Dong Lien are alter egos.

that the case arises out of the alleged misconduct of the crew, this alleged misconduct occurred in international waters – not in Houston. In order to find specific jurisdiction, the defendant's actions must be "directed at the forum state," or the case must have arisen out of a contact defendant had with the forum state. *Ruston Gas Turbines,* 9 F.3d at 419. Here, neither Shih Wei nor Dong Lien had any purposeful contact with Texas that can be directly linked to the alleged tort.[5] Accordingly, the Court may not assert specific jurisdiction over Shih Wei or Dong Lien.

B. General Jurisdiction

Plaintiffs claim that, even if the Court finds that specific jurisdiction does not exist, it may assert general jurisdiction over Shih Wei and Dong Lien. In order to find general jurisdiction, Shih Wei's and Dong Lien's contacts with the United States prior to the commencement of this lawsuit must have been continuous, systematic, and substantial. *See Wilson,* 20 F.3d at 647, 650-51; *see also World Tanker Carriers Corp.,* 99 F.3d at 723 (holding that, in admiralty cases, courts must determine if the defendant's

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[5] Shih Wei, Dong Lien, or their agents did have contact with Texas after the alleged tort because the vessel was arrested when it reached Houston. Under the time charter party, Dong Lien was required to arrange for the vessel's release. However, this contact was a consequence of the alleged tort, so the tort did not "arise out of" this contact.

"contacts with the nation as a whole [are] sufficient to satisfy due process concerns").

Plaintiffs claim that vessels that were owned, operated, or managed by Shih Wei made forty-three to forty-five calls on U.S. ports during the three years prior to the filing of this lawsuit.[6] Plaintiffs assert that these port calls represent intentional and purposeful contact with the United States because Shih Wei made arrangements for local agents to perform essential services on their behalf while in port. For example, Plaintiffs claim that Shih Wei, through its Houston agent or agents, performed the following services while the WELL PESCADORES was in Houston: (1) disbursed funds to "various essential maritime providers (such as pilots and dockage);" (2) forwarded unpaid bills to Shih Wei for an emergency surgery and medical treatment for a crewmember; (3) had the WELL PESCADORES repaired for collision damage; and (4) agreed to and signed a "Berth Application and Acceptance of Financial Responsibility." While these activities may be considered contacts with Houston, they do not represent purposeful availment. "The 'purposeful availment' requirement

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[6] Three of the cited port calls merely list "2005" as the date, and, since this case was filed in October, 2005, the Court is unable to determine whether these calls occurred before or after the Complaint was filed. Plaintiffs also list several calls that were made after the Complaint was filed, but the Court can only consider the calls made prior to filing. *See Asarco, Inc.*, 912 F.2d at 787 n. 1 (noting that "the relevant time for determining jurisdiction is the filing of the complaint").

ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attentuated' contacts." *Burger King,* 471 U.S. at 475, 105 S.Ct. at 2183 (quoting *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), and *World Wide Volkswagen Corp.,* 444 U.S. at 299, 100 S.Ct. at 568). Here, the time-charter agreement indicates that the charterers, with certain limitations, were the decision-makers regarding the vessel's destinations. The fact that Shih Wei or Dong Lien were forced to have *essential* services performed at the port of Houston is directly attributable to the charterer's choice to sail to Houston – not to any choices made by Shih Wei or Dong Lien. *See Helicopteros,* 466 U.S. at 417, 104 S.Ct. at 1873 ("[U]nilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction."). If Shih Wei or Dong Lien had chosen to have *optional* services performed or entered into contracts with Texas residents that were not essential, then the Court could consider these contacts as purposeful availment. The contacts associated with the performance of essential services in a port that was not chosen by Shih Wei or Dong Lien, however, cannot be considered purposeful and are, instead, random, fortuitous, or attenuated.

Additionally, Fifth Circuit precedent prohibits the Court from finding that the forty-three to forty-five calls to U.S. ports, in and of themselves, represent

continuous and systematic contacts with the United States. In *Asarco, Inc.*, the Fifth Circuit was presented with a similar question. The *Asarco* vessel "sailed only on orders from its charterers," and neither the management company nor the owner controlled its destination. *Asarco, Inc.*, 912 F.2d at 786. The plaintiff asserted that Louisiana courts could exercise general jurisdiction over the management company because ships managed by said company had made twenty calls to Louisiana ports during the five years prior to the filing of the Complaint. *See id.* at 787. The Fifth Circuit found that these contacts were better characterized as "sporadic than continuous and systematic," and that they were "insufficient to cause [the management company] reasonably to anticipate the possibility of being haled into court in Louisiana." *Id.* Furthermore, because the management company had no control over where its vessels would make port, the Fifth Circuit determined that it could not "be held to have availed itself of the benefits and protections of doing business in Louisiana." *Id.*

Plaintiffs here claim that *Asarco* is distinguishable "because it [did] not involve an area of vessel operations specifically assigned to the owner's sole control." Pls.' Resp. 12. This distinction would be appropriate if the Court were attempting to determine if the *liability* for the alleged tort should be attributed to the owner or manager of the WELL PESCADORES. However, the question before the Court is whether the *contacts with the United States* of the vessels managed by Shih Wei should be

attributed to Shih Wei or Dong Lien. Controlling the crew and controlling the destination are two completely distinct areas of control, and any contacts the crews under Shih Wei or Dong Lien's control had with the forums in which the vessels made port were not purposely directed at the forum; the contacts incidental to making port in these forums were merely fortuitous. Accordingly, since Shih Wei and Dong Lien were not involved in the determination of the destinations of the vessels they owned, operated, or managed,[7] the contacts connected to these destinations cannot be attributed to them unless they purposely directed non-essential activities toward the forums while in port.

Plaintiffs argue that, notwithstanding *Asarco*, this Court's decision in *Walter v. Sealift, Inc.*, 35 F.Supp.2d 532 (S.D.Tex.1999), supports their claim that the contacts the vessels owned, managed, or operated by Shih Wei or Dong Lien made with the United States should be attributed to Shih Wei or Dong Lien. In *Walter*, this Court held that the

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[7] The Court assumes that the time-charter agreements for the other voyages noted were similar. The Court also takes note of the evidence Plaintiff offers regarding two voyages in which the vessels were turned over to the charterer in U.S. waters, which indicates that, for these two voyages, Shih Wei maintained control over the destination until the vessels reached the United States. However, even if the Court considered these two voyages to be contacts that were purposefully directed at the United States, only two voyages that are in no way connected to this cause of action are not indicative of continuous and systematic contacts.

minimum contacts prong of the due process analysis was satisfied because vessels that were operated or managed by the defendants regularly called on Texas ports. In that case, one defendant operated a time-chartered vessel that called on the Port of Houston three to four times per year over the past five years. The other defendant managed three time-chartered vessels that each came to Texas three to four times per year. The *Walter* defendants "remain[ed] in operational control of their vessels," regularly sent "employees to meet the vessel[s]," and "contract[ed] with Texas residents to provide repairs, supplies, and crews." *Walter*, 35 F.Supp.2d at 534.

While this case is analogous to *Walter* in many ways, it is also distinguishable. Like the *Walter* companies, Shih Wei and/or Dong Lien contracted for essential services while the vessels were in port in the United States and provided the crews, but there is no allegation that they contracted with any U.S. companies to provide crews. In fact, the Record indicates that the entire crew was from either Taiwan or China. Also, the instant contacts cannot be said to be as continuous and systematic as the contacts in *Walter*. Here, Plaintiffs cite two relevant Texas-port calls made by two different Dong Lien-owned vessels, and seven relevant Texas-port calls made by seven different Shih Wei-managed vessels.[8] These sporadic

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[8] Shih Wei-managed vessels called on Texas ports twice in 2003, once in 2004, and four times in 2005.

calls by various vessels are by no means akin to the *Walter* pattern in which each ship owned or managed by the defendants called on Texas ports three to four times a year consistently for five years.[9]

Furthermore, in *Walter,* the Court emphasized that the defendant "remain[ed] in operational control of their vessels and generally [knew] the precise itinerary of the voyages undertaken by them." *Id.* The Court distinguished the "significant" degree of control the *Walter* defendant maintained from that in *Nicholaisen v. Tcei Shipping Co.,* 722 F.Supp. 1162, 1165 (D.N.J.1989), in which "the lessee directed where the vessel would make port and what duties the crew would perform." *Id.* That distinction cannot be made in this case. The instant charter agreement required the charterers to "furnish the Master from

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[9] Even when one considers the calls made by Shih Wei-managed vessels to various U.S. ports, there is no discernable pattern that gives rise to an inference that Shih Wei's contacts with the United States as a whole were continuous and systematic. Fifteen different Shih-Wei owned vessels called on U.S. ports (including the Texas ports) once in 2002, nine times in 2003, fourteen times in 2004, and twenty to twenty-two times in 2005. These add up to significantly more calls than were made by the *Walter* vessels; however, the calls are not uniform like the calls in *Walter.* In *Walter,* the same vessels had continuous and systematic contacts with the same ports over a period of time. Because the calls were so consistent, the *Walter* defendants likely developed an expectation that their vessels would regularly be calling on the same Texas ports and had the ability to change this pattern if they did not desire such systematic contacts. The contacts in the instant case, like the *Asarco* contacts, are sporadic – there is no pattern whatsoever.

time to time with all requisite instructions and sailing directions," and the master was required to "perform the voyages with due despatch [sic]," and "be under the orders and directions of the Charterers as regards employment and agency." *See* Pls.' Resp. Ex. 24 ¶¶ 8, 15 (emphasis added). Thus, the degree of control maintained by Dong Lien and Shih Wei varies significantly from the degree of control maintained by the *Walter* defendant.

Plaintiffs do not present any evidence that Shih Wei or Dong Lien had any contacts with the United States other than the port calls made by vessels with which they were affiliated and the essential services performed in connection with these port calls. These port calls were, for the most part, made at the discretion of the charterers – not Shih Wei or Dong Lien, and they were not continuous and systematic. Accordingly, neither Shih Wei nor Dong Lien has sufficient contacts with the United States to justify the exercise of *in personam* jurisdiction.

C. Fair Play and Substantial Justice

As the Court noted above, sometimes the factors considered in the fair play and substantial justice prong justify the exercise of *in personam* jurisdiction "upon a lesser showing of minimum contacts than would otherwise be required." *Burger King Corp.*, 471 U.S. at 477, 105 S.Ct. at 2184. Thus, even though the Court finds that *Asarco* prohibits it from holding that Shih Wei's and Dong Lien's contacts with this forum

satisfy the minimum contacts prong under normal circumstances, the Court strongly believes this particular fact pattern requires at least an exploration into whether justice calls for an exercise of jurisdiction despite the otherwise unsubstantial contacts discussed above.

The fair play and substantial justice prong first requires the Court to inquire whether the burden imposed on Shih Wei and Dong Lien if the case were litigated in this forum renders the forum's exercise of jurisdiction unfair. "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal Indus. Co. v. Superior Court of Ca.*, 480 U.S. 102, 114, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987). In the instant case, Shih Wei would be required to travel from Taiwan for this litigation, and Dong Lien would have to travel from either Taiwan or Panama. However, since both companies are involved in international shipping on a relatively large scale and have vessels that call on U.S. ports several times a year, the burden is not as unreasonable as it would be for defendants who are not engaged in international shipping. Moreover, "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant," so the Court will next discuss those factors. *Id.*

Even though the alleged tort did not occur in Texas, Texas has a strong interest in the outcome of this dispute. The Stowaways were bound for Texas shores because they believed that this is where they could find the American dream. This, in fact has been the belief of countless immigrants who have – legally or illegally – entered our great country almost since it gained independence. In 2005 alone, 1,122,373 individuals obtained legal permanent resident status in the United States, and 27,366 of these persons were from the Dominican Republic. *See* Dep't of Homeland Sec., Office of Immigration Statistics, *2005 Yearbook of Immigration Statistics* 5 tbl.1, 10, tbl.2.[10] Additionally, 20,831 of the 604,280 individuals naturalized in 2005 were born in the Dominican Republic. *See id.* at 52 tbl.20, 54 tbl. 21. While these statistics give credence to the notion that the United States is a land of immigrants, there are times when the doors are not so wide open. The Department of Homeland Security "found" 4,587 "deportable aliens" from the Dominican Republic in 2005, and 2,929 were deported. *Id.* at 92 tbl.35, 106 tbl.41.

The Court considers this issue at a time in U.S. history when illegal immigration is at the forefront of U.S. and Texas politics. The U.S. Executive and Legislative Branches are in the midst of a national debate over immigration reform fueled by the

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[10] The Court takes judicial notice of this governmental document under Federal Rule of Evidence 201.

demand of citizens that something be done about the immigration "problem." The number of illegal aliens that enter the United States through Texas borders is one of the issues under consideration.[11] Some Texans resent the infiltration of illegal immigrants into our State, reserving the American dream for those who can afford to wait until they can enter the United States legally. Other Texans are more forgiving, reasoning that such immigrants often come to the United States in order to raise enough revenue to support their families. Still other Texans can in fact call themselves Texans only because some distant – or not so distant – ancestor was an illegal immigrant. Regardless of the variety of stands Texans take on the enforcement of immigration laws, all Texans have an opinion.

As the immigration policy of our nation currently stands, Shih Wei and/or Dong Lien faced substantial

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[11] *See*, for example, *All Things Considered: Plans for 20-Foot Border Wall Rile Texas Residents* (NPR radio broadcast June 15, 2007), *available at* 2007 WL 11289882, in which NPR's Wade Goodwyn interviewed Judge J.D. Salinas of Hidalgo County, Keith Patridge of the McAllen Economic Development Corporation, Noel Benavidez, who is a Rio Grande Valley landowner, Russ Knocke from the Department of Homeland Security, and Nancy Brown of the Santa Ana National Wildlife Refuge. The Texas residents and politicians expressed their distress over the federal government's plan to build a 135-mile-long wall along the Texas border, including concerns that it would not work and that it was detrimental to the environment. Knocke assured the listeners that fencing was an effective way to "slow down someone who's crossing the border."

monetary fines if the Stowaways had made it to the Port of Houston. *See* 8 U.S.C. § 1323 (imposing a fine of $3000.00 per stowaway). No doubt the possibility of incurring fines led to the institution of Shih Wei's policy to provide bonuses to crew-members if the WELL PESCADORES made it to Texas stowaway-free. This supports the inference that perhaps the crew would not have been motivated to dispose of the Stowaways if Dong Lien and Shih Wei did not stand to incur these fines. The fines were instituted as part of an overall immigration policy that may soon be changing.[12] Thus, this case is colored by the very policies that presently are at the forefront of American consciousness locally and nationally, and is accordingly of immense interest to citizens of Texas and all citizens of the United States.

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[12] The Legislature has recently been concerned with whether the United States should institute a guest-worker program – a concept that is fully embraced by the Executive Branch. *See, e.g.,* Robert Pear, *White House Report Lauds Immigrants' Positive Effects,* N.Y. Times, June 20, 2007, at A17, *available at* 2007 WLNR 11539019 (discussing a study that "reinforces President Bush's campaign for a comprehensive immigration bill that calls for more border security, a guest-worker program and a 'merit-based system' of selecting immigrants," and noting that the "bill, pending in the Senate, would also offer legal status and work permits to most of the estimated 12 million illegal immigrants in the United States"). If such a program were to become law, these fines – as applied to aliens who are coming here to work – may become irrelevant. However, the fines would still be a necessary prophylactic device to prevent aliens who represent a security threat from entering our borders.

The third fair play consideration involves Plaintiffs' interest in obtaining convenient and effective relief. It has been almost four years since the Stowaways were discovered on the WELL PESCADORES. The dismissal of this case and the probable appeal of said dismissal extend the amount of time the injured stowaways and the family members of the deceased stowaways will be required to wait to litigate – if they indeed are able to litigate at all. The Court is not aware of any parallel *civil* actions pending in other countries, so it appears that if Plaintiffs are denied relief here, they may not receive monetary relief anywhere.[13] Thus, Plaintiffs have a very strong interest in maintaining this action.

The final factor a court must consider in the analysis of the fair play and substantial justice prong is the interstate judicial system's interest in obtaining the most efficient resolution of controversies and in furthering substantive social policies. In an international dispute, a court must "consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction." *Asahi,* 480 U.S. at 115, 107 S.Ct. at 1034.

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[13] Three of the crewmembers were criminally indicted for murder in Panama. The Panamanian jury convicted the master and first officer of murder and acquitted another crew member. The captain and first officer face a maximum of twenty years in prison. *See Captain and Officer Found Guilty of Murder,* Safety at Sea Int'l, Aug. 1, 2005, at 8, *available at* 2005 WLNR 13917305.

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.

Id.

Humanitarian concerns require an ardent examination of the substantive social policies that permeate this jurisdictional issue. Here, the nations that are touched by this controversy are the Dominican Republic, Panama, Taiwan, and the United States. Unfortunately, neither Plaintiffs nor Defendants offer the Court any arguments regarding the social policies of these nations. It would be conceited for the Court to impose U.S. values on these nations by presuming that U.S. interests and ideals are the same as or superior to those of the other nations. So, the Court will instead consider the interests the other nations have in this dispute and synthesize these interests with general humanitarian principals that transcend national boundaries.

First, the Court will consider the Dominican Republic's interest. The Stowaways boarded the

WELL PESCADORES in the Dominican Republic, and the Court presumes that they were Dominican Republic citizens. The Dominican Republic has a strong interest in seeing that any harm that has fallen on her citizens be redressed. This interest may be diminished somewhat in the present case because the Stowaways boarded the WELL PESCADORES in an effort to escape whatever maladies faced them in their home country. Such attempts are generally monetarily driven, and it is highly probable that the Stowaways needed to find better jobs so that they could support their families. Now, the families of the two deceased Stowaways are not receiving any support from them, and the families of the survivors likely have *less* support now than they did before the incident since the injuries suffered by the survivors may have impacted their abilities to work. Thus, in addition to its interest in seeing the alleged harm redressed, the Dominican Republic has an interest in helping its poverty-stricken citizens whose plight has been magnified by these events.

If Plaintiffs had originally filed their Complaint in the Dominican Republic, it is possible that all of these concerns would have been alleviated. However, as far as this Court has been informed, they did not so file. The alleged incident occurred almost four years ago, and it is highly likely that the statute of limitations for filing in the Dominican Republic has run. *See Castillo v. Shipping Corp. of India*, 606 F.Supp. 497 (S.D.N.Y.1985) (stating that the Dominican Republic statute of limitations (in 1985) for a

negligence action was six months). Thus, Plaintiffs may not be able to find relief in the Dominican Republic, and the Dominican Republic's interests in this litigation will remain unfulfilled.

Panama and Taiwan also have interests that must be considered. Since the case was not brought in those jurisdictions, the Court must ask whether either Panama's or Taiwan's substantive social policies will be furthered or denigrated if the case is heard in the United States. Obviously, Panama and Taiwan each have an interest in ensuring that their corporations – Shih Wei and Dong Lien – are treated fairly. Of course, their interests also lie in ensuring that their corporations are not negligent. These very same concerns would be addressed in the American judicial system, and, even if there were no statute of limitations concerns, it would likely be more efficient to complete the instant litigation – particularly given the depositions that have already been taken – than to start over in a different country.

Even beyond the interests of the individual affected nations noted above is the broader concern of all nations regarding the value of human life. Stowaways come from the most impoverished segment of human society. Different countries may have different philosophies regarding the rights of the poor, but most can agree that nobody deserves to die just because he does not have enough money to pay for passage to the better, more prosperous life he seeks. Each nation herein affected, indeed each nation of the world, has an interest in ensuring that the basic

human right to life is never compromised in the name of profit. Even if Emma Lazarus's poem can no longer symbolize the United States opening her arms and heart to those underprivileged individuals who come to her seeking refuge, it should at least symbolize that these helpless souls make it here alive.

Given the important and extant social interests implicated in this case, the Court is certainly tempted to find that even though *Asarco* essentially invalidates the contacts Plaintiffs point to, the exercise of jurisdiction is justified.[14] However, given

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[14] The social fabric of American life is constantly changing, but, hopefully, the following quote by Thomas Paine will never cease to reflect American ideology: "'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.'" Neal Katyal, *Equality in the War on Terror*, 59 Stan. L.Rev. 1365, 1394 (2007) (quoting Transcript of Oral Argument at 83, *Hamdan v. Rumsfeld*, ___ U.S. ___, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006) (No. 05-184), *available at* http://www. supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf (quoting Thomas Paine, *Dissertation on First Principles of Government* (July 1795), *in* 2 The Complete Writings of Thomas Paine 570, 588 (Philip S. Foner ed., 1945))) (explaining that he (the author) represented Hamdan because, as the son of immigrants who came here because of this nation's "central commitment to equality," he was "deeply patriotic" and concerned that his – and his parents' – "vision of America was being violated"). The fair play and substantial justice prong allows courts some latitude to satisfy this duty in personal jurisdiction analyses, but when the decision is too policy-contingent, it is best to allow the Circuit to determine whether guarding the plaintiffs from oppression is a substantial enough social interest to justify the exercise of *in personam* jurisdiction.

the substantial weight the *Asahi* Court placed on the "serious burdens" litigating in the United States places on alien defendants, the Court finds that this case unquestionably implicates policy considerations best left to the Circuit and thus leaves it to Plaintiffs to file an appeal if they so agree.

IV. Conclusion

For the reasons discussed above, Shih Wei's and Dong Lien's Motions to Dismiss for Lack of Personal Jurisdiction are regrettably **GRANTED.** All claims against Shih Wei and Dong Lien are hereby **DISMISSED WITHOUT PREJUDICE.** Each Party to bear its own taxable costs and attorneys' fees.

IT IS SO ORDERED.

103

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No. 07-1551

Supreme Court, U.S.
FILED
AUG 12 2008
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IN THE

Supreme Court of the United States

OLGA DE LEON, DAURYS BLADIMIL DE LEON, RAFAELA DE LEON, FRANKLIN ROA, JOSE GUERRERO MARTE, and CRISTIAN ENCARNACION,

Petitioners,

v.

SHIH WEI NAVIGATION COMPANY LTD and DONG LIEN MARITIME SA PANAMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Dong Lien Maritime SA Panama, chartered in Panama, headquartered in Taipei, Taiwan, Republic of China, is a 100% subsidiary of Shih Wei Navigation Company, Ltd.

Shih Wei Navigation Company, Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6 ...	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Course of Proceedings and Disposition in the Two Courts Below.	1
B. Statement of Facts.	2
1. The Incident Involving the Stowaways.	2
2. The Control of the M/V WELL PESCADORES during the Relevant Time Period.	3
3. The Defendants' Lack of Contacts with the United States	4
REASONS FOR DENYING THE PETITION	6
A. The Facts of the Case do not Present the Question Suggested by the Petitioner. ..	6

Contents

	Page
B. The Judgment Below is not Based on a Fundamental Misconception of the Law.	6
1. Requirements for the Exercise of General Jurisdiction	7
2. No Personal Jurisdiction Exists over Respondents where Charterers Directed the U.S. Calls of Their Vessels, Because Respondents did not Purposefully Avail Themselves of the Benefits and Protections of the Forum.	8
C. The Decisions of the United States Court of Appeals for the Fifth Circuit are in Accord with Decisions Rendered by the Other Circuit Courts.	10
D. There is No Conflict with the Decisions of This Court.	12
E. No Constitutional Question is Presented.	12
CONCLUSION	13

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Page

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Alpine View Co. v. Atlas Copco AB,
205 F.3d 208 (5th Cir. 2000) 7, 8

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912 F.2d 784 (5th Cir. 1990) ..... *passim*

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471 U.S. 462 (1985) 8

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1998 U.S. Dist. LEXIS 16293 (S.D.N.Y. 1998) ... 10

Carter v. LaGloria Shipping,
1997 U.S. Dist. LEXIS 11047 (E.D. La. 1997)
..... 9

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1993 U.S. Dist. LEXIS 13786 (E.D. Pa. 1993)
..... 10

Francosteel Corp. v. M/V CHARM,
19 F.3d 624 (11th Cir. 1994) 11

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1996 U.S. Dist. LEXIS 21561 (S.D. Tex. 1996)
..... 9

Cited Authorities

	Page
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Porina v. Marward Shipping Co., 2006 U.S. Dist. LEXIS 60535 (S.D.N.Y. 2006)	11
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Sibrian v. Chapel Navigation, Ltd., 1997 U.S. Dist. LEXIS 19616 (E.D. La. 1997)	9
Sompo Japan Ins. Co. of Am. v. M/V COMMANDER, 329 F. Supp. 2d 971 (N.D. Ill. 2004)	11
World Tanker Carriers Corp. v. M/V YA MAWLAYA, 99 F.3d 717 (5th Cir. 1996)	7, 9

Cited Authorities

Page

Rules

FED. R. CIV. P. 4(k)(2) 6, 9

FED. R. CIV. P. 12(b)(2) 9

Respondents, Shih Wei Navigation Company Ltd. and Dong Lien Maritime SA Panama, file this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Olga De Leon, *et al*, and would show as follows:

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Two Courts Below.

The Petitioners brought suit against Man Shipping, L.P. and Shih Wei Navigation Co., Ltd. in the United States District Court for the Southern District of Texas, Galveston Division, on October 28, 2005. Petitioners subsequently amended their complaint to include as defendants Man Shipping Limited, American Shipping and Chartering Corp., BHPB FT&L, BHP Billiton Transport & Logistics Pty. Ltd., Melbourne, Anchor Cross Shipbrokers Pty. Ltd., Dong Lien Maritime S.A. Panama, China Xiamen Corp. for International Tech-Eg-N Corp., and WELL PESCADORES S.A. BHPB Freight Party Ltd. then brought a Third-Party Complaint against Pegasus Denizcilik AS, the vessel's subcharterer. All of the defendants except the Respondents were voluntarily dismissed by Petitioners. The Respondents each filed a Motion to Dismiss for Lack of Personal Jurisdiction. The Petitioners filed a Motion for a New Trial on July 20, 2007, which was denied on August 3, 2007. Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on August 28, 2007. The Fifth Circuit affirmed the District Court's order in a *per curiam* opinion filed on March 13, 2008. Petitioners now seek a Writ of Certiorari.

B. Statement of Facts.

1. The Incident Involving the Stowaways.

In March of 2003, five citizens of the Dominican Republic—William De Leon, Franklin De Leon, Franklin Roa, Jose Guerrero Marte, and Cristian Encarnacion (the "Stowaways")—covertly boarded the M/V WELL PESCADORES while it was on call in Santo Domingo, Dominican Republic.[1] The Stowaways secreted themselves in a hold of the ship in an apparent attempt to illegally enter the United States. While the vessel was in international waters *en route* to Houston, Texas, the Stowaways made themselves known to the crew. The crew insisted the Stowaways leave the vessel and put them overboard on rafts constructed out of dunnage.[2] Franklin Roa, Jose Guerrero Marte, and Cristian Encarnacion were picked up by a passing vessel approximately four hours later. Tragically, two of the Stowaways, William de Leon and Franklin de Leon, were apparently unable to swim and never made it to the raft.

The M/V WELL PESCADORES arrived in Houston on March 28, 2003. The Coast Guard placed a hold on the vessel pending an investigation by the Coast Guard and the FBI. The authorities ultimately turned the handling of the incident over to the Republic of Panama,

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1. At all times relevant to this case, the M/V WELLS PESCADORES was a Panamanian-flagged cargo ship that was operating under charter party agreement.

2. The actions of the chartered vessel's crew was in direct violation of the operating policy of the M/V WELLS PESCADORES.

the vessel's flag state. The WELL PESCADORES departed Houston for Panama on April 30, 2003.

2. The Control of the M/V WELL PESCADORES during the Relevant Time Period.

On the date of the incident, the M/V WELL PESCADORES was chartered to BHP Billiton Transport and Logistics Pty, Ltd., Melbourne under a Time Charter Party dated August 16, 2002 executed between BHPB and Dong Lien, as despondent owner. Man Shipping, a limited partnership existing under the laws of the Isle of Man, was the registered owner of the M/V WELL PESCADORES. Shih Wei served as the manager of the vessel. Dong Lien, a 100% owned subsidiary of Shih Wei, acted as its agent in executing the Time Charter Party as Owner. Shih Wei is incorporated under the laws of the Republic of China (Taiwan) and Dong Lien is a corporation incorporated under the laws of Panama. BHPB is a corporation incorporated under the laws of Australia. The Time Charter Party between BHPB and Dong Lien was negotiated exclusively in Taiwan and Melbourne, Australia, and executed in Melbourne, Australia.

Pegasus Shipping sub-chartered the M/V WELL PESCADORES from BHPB pursuant to a Voyage Time Charter Party dated January 6, 2003, and was the sub-charterer of the vessel at the time of the incident. Pegasus Shipping is a corporation incorporated under the laws of Turkey. The Charter Party between BHPB and Pegasus was executed in London, England.

The movements of the M/V WELL PESCADORES during the voyage in question, including the vessel's call at Houston to discharge cargo, were directed by its charterer, BHP Billiton Transport and Logistics Pty. Ltd., Melbourne, or its sub-charterer, Pegasus Denizcilik AS. Neither Shih Wei nor Dong Lien directed the M/V WELL PESCADORES to call at Houston.

3. The Defendants' Lack of Contacts with the United States

Shih Wei is a corporation incorporated under the laws of Taiwan (Republic of China). Dong Lien is a corporation incorporated under the laws of the Republic of Panama. Both Shih Wei and Dong Lien have their principal place of business at 16F, No. 167, Fusing N. Road, Song-Shan District, Taipei 105, Taiwan (Republic of China).

Neither of the Respondents have had any contacts with the United States other than isolated vessel calls to U.S. ports made at the direction of the vessels' charterers. They have no place of business or any office in the United States. They have no employees, agents, or servants located in the United States. The Respondents have never maintained a telephone number or a mailing address in the United States. The Respondents have no ownership relationship with or interest in any United States corporation or business entity, either as a parent, subsidiary, affiliate or otherwise. The Respondents have never owned, leased, or possessed any interest in property, real or personal, in the United States, been licensed or authorized to do business in any state of the United States, or earned

any income within the United States. The Respondents have never sold or produced any products and have never stored any goods or supplies in the United States.

Moreover, Respondents have never advertised or solicited any business within the United States. Respondents maintain no accounts or records in the United States. They maintain no bank accounts or banking relations in the United States and have not paid any taxes in the United States. Respondents have never initiated any legal proceedings in the United States. All of the Respondents' corporate representatives and witnesses and all of their corporate documents relative to this suit are located outside of the United States.

At the time of the voyage at issue, Shih Wei managed twenty-two vessels. Shih Wei-managed vessels made forty-three to forty-five calls to U.S. ports during the three-year period prior to the incident involving the Stowaways. This equates to each Shih Wei vessel calling on a U.S. port an average of 0.68 times per year, or roughly twice every three years. To the extent Shih Wei-managed vessels have called at U.S. ports, such calls were made at the commercial direction and control of the respective vessel's charterer or sub-charterer. Shih Wei has never purposely directed any vessel in its management fleet to the United States.

Dong Lien owned three vessels during the relevant period. To the extent that any of its vessels called in the United States, such calls were made at the commercial direction and control of the respective vessel's charterer or sub-charterer. Dong Lien has never purposely directed any vessel in its fleet to the United States.

REASONS FOR DENYING THE PETITION

There is no compelling reason for the Court to grant Petitioners' Request for Writ of Certiorari.

A. The Facts of the Case do not Present the Question Suggested by the Petitioner.

The only issue that may properly be brought before this Court is whether the Fifth Circuit Court of Appeals and the District Court correctly held that isolated vessel calls made to the United States at the direction of third party vessel charterers did not provided a basis for finding general personal jurisdiction over the Respondents, following *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 785-787 (5th Cir. 1990)).

Petitioners did not contest the district court's conclusion that it could not exercise specific jurisdiction over Respondents on appeal. Hence the question of specific personal jurisdiction is not before the Court. Moreover, there was no basis for finding specific jurisdiction because the alleged misconduct of the crew occurred in international waters.

B. The Judgment Below is not Based on a Fundamental Misconception of the Law.

The Petitioners urge that the holdings below are based on an incorrect analysis based on statewide rather than nationwide contacts. In essence, Petitioners argue that the courts below did not consider nationwide personal jurisdiction under FED. R. CIV. P. 4(k)(2). This is not accurate. The Fifth Circuit and the trial court

properly concluded that no general personal jurisdiction exists over the Respondents based on their *nationwide* contacts, relying on *Asarco*. *Id.* The courts below held that there was no personal jurisdiction because: (1) the Respondents' sole contacts with the *United States* were forty-three to forty-five vessel calls by a fleet of twenty-two managed vessels during a three-year time period, made solely at the direction of the individual vessels' charterer; (2) vessel calls made at the direction of a vessel's charterer, not by the Respondents, cannot constitute purposeful availment for purposes of personal jurisdiction; and (3) even if the vessel calls were at the direction of the Respondents, the isolated and sporadic nature of the vessel calls are not substantial enough to satisfy due process requirements for the assertion of personal jurisdiction.

1. Requirements for the Exercise of General Jurisdiction

General personal jurisdiction cannot be exercised over a nonresident defendant unless there are "continuous, systematic, and substantial" contacts between the nonresident defendant and the forum state or the United States generally. *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 217 (5th Cir. 2000). The burden of persuasion remains with the plaintiff to make a *prima facie* showing of the Defendants' nationwide minimum contacts. *World Tanker Carriers Corp. v. M/V YA MAWLAYA*, 99 F.3d 717, 723-24 (5th Cir. 1996).

To make a *prima facie* showing of general personal jurisdiction, a plaintiff must produce evidence which affirmatively shows that the defendant has contacts with

the United States, unrelated to the litigation, that are sufficient to satisfy due process requirements. *Alpine View*, 205 F.3d at 217. Further, a non-resident defendant must purposely avail itself of the benefits of doing business in the United States and have fair warning that particular activities may subject it to U.S. jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Therefore, a non-resident may not be subjected to jurisdiction in the United States based upon "random, fortuitous, or attenuated" contacts over which it had no control. *Id.* at 475.

2. No Personal Jurisdiction Exists over Respondents where Charterers Directed the U.S. Calls of their Vessels, Because Respondents did not Purposefully Avail Themselves of the Benefits and Protections of the Forum.

Petitioners base their argument for the exercise of general personal jurisdiction over the Respondents solely on the calls made to the United States by vessels owned and/or managed by the Respondents which were under charter to and under the directional control of third parties. There is no other basis for personal jurisdiction.

Petitioners' argument fails under the well-established Fifth Circuit precedent that vessel calls at U.S. ports made at the direction of a vessel's charterer are not sufficient to establish purposeful availment by the vessel's owner or manager for purposes of personal jurisdiction. *See, e.g., Asarco*, 912 F.2d at 786-87. Petitioners' suggestion that *Asarco* does not apply because it analyzed the sufficiency of minimum contacts

on merely a statewide basis as opposed to a national basis is inapposite, because the same standard—whether the exercise of jurisdiction comports with the limits of due process—applies in both situations. *See* FED. R. CIV. P. 12(b)(2); FED. R. CIV. P. 4(k)(2); *World Tanker Carriers Corp.*, 99 F.3d at 723-24. Moreover, the courts below based their holdings that there was no general personal jurisdiction after considering *all* the U.S. port calls made by Respondents' vessels.

Relying on *Asarco*, district courts within the Fifth Circuit have also continuously refused to exercise jurisdiction over the owners and managers of vessels under charter who did not direct or control their vessels' calls to U.S. ports. *See, e.g., Griner Co. v. M/V CONTI BLUE*, 1996 U.S. Dist. LEXIS 21561 *4-5 (S.D. Tex. 1996) (holding that "[u]nder Fifth Circuit law, it is clear that the owner of a vessel is not subject to personal jurisdiction merely because his vessel was used to transport goods into the forum state," and thus refusing to exercise personal jurisdiction over vessel owner).[3]

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3. *See also Saudi v. S/T MARINE ATLANTIC*, 159 F. Supp. 2d 469, 482 (S.D. Tex. 2000) (noting that "where the non-resident defendant does not direct and control the destination of the vessel, there is no personal jurisdiction over that defendant because that defendant cannot purposely avail itself of the benefits and protections of the forum port"); *Sibrian v. Chapel Navigation, Ltd.*, 1997 U.S. Dist. LEXIS 19616 *4 (E.D. La. 1997) (holding that "because the [vessel] owner did not choose the ports, the owner cannot be held to have availed itself of the benefits and protections of doing business in Louisiana by virtue of the contacts"); *Carter v. LaGloria Shipping*, 1997 U.S. Dist. LEXIS 11047 *8-9 (E.D. La. 1997) (noting that all vessel calls

(Cont'd)

C. The Decisions of the United States Court of Appeals for the Fifth Circuit are in Accord with Decisions Rendered by the Other Circuit Courts.

Courts outside the Fifth Circuit have consistently followed and been in accord with the Fifth Circuits holding in *Asarco*. There are no conflicts among the Circuits. For example, the District Court for the Southern District of New York held that all of a vessel owner's U.S. contacts in the aggregate did not amount to "continuous and systematic general business contacts" so as to provide a basis for general jurisdiction where the charterer, not the owner, directed the movement of the vessel. *In Re: Complaint of KRETA SHIPPING, S.A* 1998 U.S. Dist. LEXIS 5081, *21 (S.D.N.Y. 1998) (*relying on Asarco, Inc.*, 912 F.2d at 787).[4]

In *Conner v. Bouchard Transp. Co. Inc.*, the District Court for the Eastern District of Pennsylvania refused to exercise jurisdiction over a vessel owner/manager where

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(Cont'd)
were made at direction of charterer, not Defendants); *In re Gemini Navigation*, 1996 U.S. Dist. LEXIS 20860 *11 (S.D. Tex. 1996) (noting that "the mere fact that a vessel makes numerous port calls in a particular state does not, in itself, demonstrate contacts sufficient for exercising general personal jurisdiction").

4. *See also Canadian Group Underwriters Ins. Co. v. M/V "Arctic Trader,"* 1998 U.S. Dist. LEXIS 16293 (S.D.N.Y. 1998) (relying in part on *Asarco* in finding that even when the charter party agreement limits the possible destinations of the charterer, it is still the charterer and not the owner who finally chooses the destination and therefore the court cannot assert personal jurisdiction over the owner).

the defendant's only contacts were 100 calls to the Port of Philadelphia at the direction of the charterers, by thirty-six vessels, during a five-year period. 1993 U.S. Dist. LEXIS 13786 *4-10 (E.D. Pa. 1993) (relying on *Asarco* in holding that when the charterer and not the owner determines where the vessels will sail that the contact can best be described as "'haphazard and fortuitous,' rather than systematic and continuous").

The Northern District of Illinois came to a similar conclusion in *Sompo v. M/V COMMANDER*, where it refused to exercise personal jurisdiction over the vessel owner where the charterer directed the cargo to the United States. *Sompo Japan Ins. Co. of Am.*, 329 F. Supp. 2d 971, 971-73 (N.D. Ill. 2004) (relying in part on *Asarco* in holding that there was no purposeful availment where the owner did not direct the movement of the vessel).

There are numerous other cases throughout the circuits where the courts came to the same conclusion as *Asarco* without specifically referring to and/or relying on that opinion.[5]

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5. *See Francosteel Corp. v. M/V CHARM*, 19 F.3d 624, 628 (11th Cir. 1994) (refusing to exercise personal jurisdiction over vessel owner and manager, and noting that sub-charterer, not vessel interest defendants, controlled the destination of the vessel); *Nicolaisen v. Toei Shipping Co.*, 722 F. Supp. 1162, 1165 (D.N.J. 1989) (refusing to exercise personal jurisdiction over vessel owner based on seventeen port calls made by one vessel to New Jersey during a four-year period, and characterizing these contacts as "haphazard and fortuitous rather than continuous and systematic"); *Porina v. Marward Shipping Co.*, 2006 U.S. Dist. LEXIS 60535 *17-22 (S.D.N.Y. 2006) (the court declined to find personal jurisdiction where charterer not vessel owner directed movement of vessel even though one vessel visited forum state seventeen times in two-year period).

D. There is no Conflict with the Decisions of This Court.

The Petitioners point to no decision of this Court with which the holding below conflicts. The Fifth Circuit in its decision below relied exclusively on *Ascarco, Inc. v. Glenara, Ltd, supra*, to hold that the Respondents "lack the requisite 'continuous and systematic' contact with the forum to support the exercise of general personal jurisdiction." (Slip Op. at 8). There is nothing to suggest that the analysis employed in *Ascarco* is in conflict with any decision of this Court. As in this case, the only contacts the defendant in *Ascarco* had with the forum were vessel calls made at the direction of the charterers who were third parties to the litigation. *Asarco*, 912 F.2d at 787. Consistent with the decisions of this Court, the Fifth Circuit held that the defendant "cannot be held to have availed itself of the benefits and protections of doing business in [the forum state] by virtue of its sporadic operational management of vessels set to [the forum state] by others." *Id.* This specific application of the general guidance found in the decisions of this Court for due process inquiry to be carried out to determine if the exercise of personal jurisdiction is appropriate is consistent with those decisions and has been utilized in many situations without controversy.

E. No Constitutional Question is Presented.

The constitutionality of statute of the United States or of any State is implicated by the decisions below.

CONCLUSION

The Petition before the Court does not present special and important matters for certiorari. The decisions below were correct, consistent to other federal appellate circuit courts, and are consistent with the prior decisions of this Court. Finally, no constitutional questions or matters of grave social concern are presented. Accordingly, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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